No. 16008

United States Court of Appeals

For the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant,*

vs.

E. L. FRANCE, Trustee, *et al., Appellees.*

APPEAL FROM UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION
HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEES

SKEEL, MCKELVY, HENKE, EVENSON & UHLMANN
WILLIAM E. EVENSON, JR.
Dexter Horton Building, Seattle 4, Wash.

CARNAHAN, GORDON & GOODWIN
HARRY SAGER
Puget Sound Bank Building, Tacoma 2, Wash.

GLENN E. CORREA
Bell Building, Shelton, Washington

RYAN, ASKREN, MATHEWSON, CARLSON & BUSH
RAYMOND C. SWANSON
Henry Building, Seattle 1, Washington

MARSHALL MCCORMICK
City Attorney, City of Tacoma
ROBERT R. HAMILTON
ALLAN R. BILLETT
Assistants City Attorney
304 City Hall, Tacoma, Washington

B. FRANKLIN HEUSTON, Shelton, Washington
J. W. GRAHAM, Shelton, Washington
Attorneys for Appellees.

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304 City Hall, Tacoma, Washington

B. FRANKLIN HEUSTON, Shelton, Washington
J. W. GRAHAM, Shelton, Washington
Attorneys for Appellees.

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United States Court of Appeals
For the Ninth Circuit

Skokomish Indian Tribe,	*Appellant,*	No. 16008
vs.		
E. L. France, Trustee, *et al.,*	*Appellees.*	

Appeal from United States District Court for
Western District of Washington
Southern Division
Honorable George H. Boldt, *Judge*

BRIEF OF APPELLEES

Ernest Carlson, *et al.*; Simpson Logging Co., *et al.*; Marcus Nalley, *et al.*; City of Tacoma; Chas. T. Wright, *et al.*; E. L. France, *et al.*

MOTION TO DISMISS APPEAL

Motion

The appellees participating in this brief hereby move to dismiss the appeal of Skokomish Indian Tribe upon the ground and for the reason that the same has not been made nor perfected within the time or in the manner allowed by law or the applicable rules of court, in support of which motion appellants cite the following points and authorities.

Points and Authorities

The time limit on this appeal is thirty days from the entry of the order of dismissal (RCP 73). The time limit is jurisdictional. The final order was entered August 2, 1957 (Tr. 129-131) and the time was not enlarged by the later confirmatory order filed in December, 1957 (Tr. 132-134).

The notice of appeal filed January 6, 1958 (Tr. 134) was not within the thirty-day jurisdictional time limit under Rule 73 because the thirty days began to run August 2, 1957, when the court ordered the action dismissed (Tr. 129-131).

The time for filing notice of appeal under Rule 73 is jurisdictional.

Slater v. Peyser (CADC 1952) 200 F.2d 360;

Deena Products Co. v. United Brick Workers (CA-6 1952) 195 F.2d 612, cert. den. 344 U.S. 822;

Shotkin v. Popenhager (CA-5 1958) 255 F.2d 100.

The record shows the final and appealable order was entered August 2, 1957 (Tr. 129-131) and more than the permissible time before the notice of appeal. Rule 58 in part specifies

> ". . . When the court directs that a party recover only money or costs *or that all relief be denied,* the clerk shall enter judgment forthwith upon receipt by him of the direction . . ."

Here the decision of August 2, 1957, was final and it was that "all relief be denied."

A later or confirmatory order, such as that signed in December (Tr. 132), would not enlarge the time for appeal.

Erstling v. Southern Bell Co. (CA-5 1958) 255 F.2d 93;

United States v. Wissahickon Tool Works (CA-2 1952) 200 F.2d 936, 938;

Napier v. Delaware R. Co. (CA-2 1955) 223 F.2d 28, 30-31;

Leonard v. Prince Line (CA-2 1946) 157 F.2d 987, 989;

Stone v. Wyoming Supreme Court (CA-10 1956) 236 F.2d 275.

All the foregoing cases recognize that there are sometimes confirmatory or duplicative orders entered and the holdings uniformly are that these do not enlarge the time for appeal. Contrasted with such cases is such a case as *United States v. Schaefer Brewing Co.* (1958) 356 U.S. 227, 2 L.ed. 721, in which the first order of the court, determining the right to relief in the case of an action for the recovery of money did not compute or describe the amount awarded and accordingly there had to be of necessity a later "final" order determinative of the proceedings. In such cases where a later order is required, such as in the case where a money judgment must be computed and awarded, the later order is held to be the appealable order. Such would not be true in the case now before the court.

ANSWERING BRIEF OF APPELLEES

Introduction — Nature of Case

This proceeding, commenced over ten years ago by the filing of appellant's complaint in the District Court, now reaches the Court of Appeals upon a challenge to the order dismissing the proceedings for want of jurisdiction in the District Court.

This is an action brought to quiet title to land in which the plaintiff must prevail solely upon the strength of its own title. This is not an action of trespass.

Appellant is responsible for the protracted character of this proceeding. Appellant's position and conduct is

so lacking in equity that it can hardly expect this court to strain to find justification for its position.

The complaint was filed in 1948 (Tr. 33). As service on the several defendants was made, they separately made appropriate motions to dismiss, principally during 1949 (Tr. 35-46). Judge Lindberg, in July, 1952, overruled then pending motions to dismiss (Tr. 47-53). The printed record does not reveal the answers then filed. However, in 1954, motions to dismiss for want of prosecution were submitted (Tr. 53-61) and an explanation of the delay in the litigation is reflected in the supporting affidavits (Tr. 54, 59).

While the motions to dismiss for want of prosecution were conditionally denied, a requirement for a pretrial order and a trial was fixed by an order of April 20, 1954 (Tr. 61-63).

The motions to dismiss for want of prosecution were again filed in 1956 (Tr. 72) and the delay further explained by affidavit and brief (Tr. 73, 75). These motions by appellees finally forced appellant to participate in and be a party to a pretrial order, entered October 1, 1956 (Tr. 80-115).

At the direction of the District Court, specific defendants' contentions against jurisdiction to hear the proceedings were re-argued and reconsidered before the court on June 12, 1957 (Tr. 117) and on August 2, 1957 (Tr. 129), on which latter date the court ordered the action dismissed (Tr. 131).

After a series of motions and orders postponing action in this appeal, a transcript was printed and became available in September, 1958, and appellant's brief

in November, 1958, virtually a decade after the initial filing of the action.

Pleadings

This case arises solely under a Pretrial Order (Tr. 80) which superseded all pleadings (Tr. 115).

It should be noted, however, that a substantial part of the Pretrial Order is not printed in the transcript. Pages 3 to 18, inclusive, and pages 19 to 36, inclusive, of the "Admitted Facts" in particular are not so printed.

It should be noted also that quotations from some publication, at pages 51 and following in the appendix to appellant's brief, are not a part of the record in this matter and not a part of the Pretrial Order.

Statement of the Case

Appellant's statement of the case obliges us to add the following clarification. As already noted, the action is not one of trespass.

Contrary to appellant's statement, the treaty (12 St. at L. 933) does not mention "shore lands in Hood Canal," let alone specify that the same were reserved for the exclusive use of Indians (nor the plaintiff corporation).

The treaty, contrary to appellant's statement, does not give the Indians (nor the plaintiff corporation) exclusive use of the "bed of Hood Canal" nor of any "tide lands touching upon or bordering the reservation." The treaty says nothing about such rights, exclusive or otherwise.

The treaty, contrary to appellant's statement, does

not grant to the Indians the "exclusive right to fish" at any particular location.

It is not a "fact" established in any way or admitted, as appellant gratuitously assumes throughout its brief, that these particular Indians sustained themselves to a great extent or to any extent whatever from shellfish from any part of the tide land strip in question. These are factual matters specifically, so reserved for trial in the Pretrial Order (Tr. 99, 97).

Amount of Tide Land Property Involved

The Skokomish Indian Reservation extends along several miles of the Skokomish River, passing through three full sections and parts of three others. The reservation also fronts on Hood Canal from the mouth of the river northward for several miles, extending the full width of Sections 26, 35 and 1 and parts of two other sections (Tr. 81).

Portions of the reservation have heretofore been lawfully allotted to Indians and alienated, such that by mesne conveyances those portions now are vested in the several defendant appellees or their successors. A narrow strip of tide lands over which the tide ebbs and flows, abutting upon each small upland tract, was conveyed by the State of Washington the defendant appellees or their predecessors in title (Pretrial Order pp. 3 to 36, not printed in transcript).

The several defendant appellees have no common interest other than the fact that they are being concurrently sued by appellant. They are cooperating in the preparation of this brief for reasons of economy.

Most of the parcels owned by defendant appellees are comparatively small, with narrow frontage on Hood Canal. For example, the Potlatch Beach tracts, in which several appellees are interested, are only forty to fifty feet in width (Pl. Ex. 15, Tr. 106). As to each of these parties, only that extent of the tide land strip submerged at each high tide is here involved.

The Skokomish Indian Reservation extends for miles along the Skokomish River and by way of that river the reservation has complete access to Hood Canal and the sea (Executive Order, Ex. 4, Tr. 105; Map, Ex. 7, Tr. 106).

This case involves, in the case of the individual defendant appellees, only a comparatively small segment of the tide land strip as it abuts their upland ownership, which long ago was lawfully alienated from Indian ownership.

Utility and Character of Tide Land Strip Not Involved

The rocky, gravelly, sandy or other character of the various segments of the tide land strip is not involved on this appeal, nor is the commercial character thereof, if any, nor any utility thereof for shellfish or scenery or any other conceivable purpose. Nor does this appeal involve whether the several segments are similar or dissimilar. These are not matters settled in the Pretrial Order (Tr. 80).

Jurisdiction

Appellant asserts jurisdiction under 28 U.S.C. Secs. 1331 and 1345. Appellees deny jurisdiction of this case exists in the District Court under the cited sections or at all.

Section 1345

Jurisdiction under 28 U.S.C. Section 1345, relating to actions by an agency or officer of the United States, was never claimed in any pleading before the District Court.

Plaintiff is not the United States nor an officer of the United States. Plaintiff is not an "agency" of the United States. The judicial code, 28 U.S.C. 451, 62 St. at L. 907, for the purposes of that code, expressly states that a corporation within the meaning of the term "agency" means a corporation in which the United States has a proprietary interest." Manifestly plaintiff cannot bring itself within the class of those entitled to invoke the jurisdiction of the District Court under Section 1345.

The decision in *Martinez v. Southern Ute Tribe* (CA-10 1957) 249 F.2d 915, 919, specifically holds incorporated tribes are not corporations pursuant to Section 1349 nor agencies of the United States as contemplated by Section 1345.

Section 1349

Also, jurisdiction may not be invoked by appellant on the theory that it is a corporation pursuant to an Act of Congress, since 28 U.S.C. Sec. 1349 specifies:

> "The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."

Section 1331

The only section of the code under which appellant

has ever presumed to assert jurisdiction existed in the District Court in 28 U.S.C. Sec. 1331. Appellees, under appropriate chapter headings in this brief, will show the court

(a) that no federal question exists in this matter and the case does not arise under the constitution, laws or treaties of the United States,

(b) that the amount in controversy is not shown to exceed the sum or value of $3,000 (but the action represents an unlawful attempt to join several separate lawsuits against numerous defendants for the purpose of aggregating the amounts).

That the action is brought by or on behalf of an Indian or an Indian tribe does not confer jurisdiction on the federal court. That an Indian tribe's right of possession is guaranteed by a treaty with the United States does not itself confer original jurisdiction on the federal court.

Deere v. St. Lawrence River Power Co. (CA-2 1929) 32 F.2d 550;

Teeters v. Henton (D.C. Wyo. 1930) 43 F.2d 175;

Phelps v. Hanson (CA-9 1947) 163 F.2d 973;

In re Celestine (D.C. Wash. 1902) 114 Fed. 551.

The foregoing cases hold no federal question was involved sufficient to give the District Court jurisdiction.

Existence of a Federal Question

No federal question actually exists under Section 1331 in this case. While the meaning of descriptive words in an executive order is involved, the meaning of

no law, constitution or treaty is involved in this action. The cited treaty does not deal directly with the tide lands in question. This litigation is concerned only with the extent of the legal description used in a later executive order. This is not a treaty question. It is not a federal question.

Shulthis v. McDougal (1912) 225 U.S. 561;

Crystal Springs Land & Water Co. v. City of Los Angeles (CC Cal. 1897) 82 Fed. 114, 117 affirmed 177 U.S. 169;

Joy v. City of St. Louis (1906) 201 U.S. 332;

Devine v. Los Angeles (1906) 202 U.S. 313, 333-4.

In *Shulthis v. McDougal, supra,* the court at page 569 says:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all titles in those states are traceable back to those laws."

In the *Crystal Springs case,* the court at page 117 says:

> "Where the parties claim under Spanish or Mexican grants, confirmed and patented by the United States, and the controversy is only as to

> what were the rights acquired by the parties respectively, or their predecessors in interest, under the Spanish or Mexican governments, it being conceded that the rights so acquired, whatever they may have been, were included in the confirmation and quitclaimed through the patent of the United States, federal jurisdiction does not exist . . ."

The case of *United States v. Ashton* (1909) 170 Fed. 509 (appeal dismissed 220 U.S. 604) conclusively shows want of jurisdiction in the District Court in a parallel case, where representatives of the Puyallup Indian Tribe sought to have the executive order defining the Puyallup Reservation interpreted to extend beyond the language of the executive order and to include abutting tide lands.

See also *Beck v. Johnson* (CC. Ky. 1909) 169 Fed. 154.

Complaint Fails to Show the Matter in Controversy Exceeds the Sum of $3,000.00

Section 1331, Title 28, U.S.C.A., prior to its recent amendment, provided:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Plaintiff alleges that the matter in controversy exceeds the sum of $3,000.00 but plaintiff does not contend nor allege that the matter in controversy exceeds the sum of $3,000.00 as to each defendant (Tr. 4, 84).

This court does not have jurisdiction when several demands are made by one plaintiff against several de-

fendants when in each case the suit does not involve the jurisdictional amount. *Citizens Bank v. Cannon,* 164 U.S. 319; *Fishback v. Western Union Telegraph Co.,* 161 U.S. 96, 16 S.Ct. 506; *Fecheimer Bros. Co. v. Barnwasser* (6th Cir. 1945) 146 F.(2d) 974; *Vaughn v. Warfield* (8th Cir. 1953) 207 F.(2d) 350; *Calvert Distillers Corp. v. Rosen* (N.D. Ill. 1953) 115 F.Supp. 146.

The general rule is that jurisdiction is not conferred upon the federal court by joining claims against distinct and separate defendants, no one of which equals the jurisdictional amount. *Essmon v. Hood* (N.D. Texas 1930) 45 F.(2d) 881; *Hager v. Hanover Fire Ins. Co. of New York* (W.D. Missouri 1945) 64 F.Supp. 949; *Walter v. Northeastern Railroad Co.* (1893) 147 U.S. 370, 13 S.Ct. 348.

In *Stemmler v. McNiel* (C.C. E.D. N.C. 1900) 102 Fed. 660, the rules in reference to a quiet title action brought against multiple defendants were stated as follows, at page 661:

> ". . . It is the rule of the Federal Courts that if there be several co-plaintiffs, each plaintiff must be competent to sue, and if there be several defendants, each defendant must be liable to be sued, or jurisdiction cannot be entertained. (Citing cases) So in this case, if each defendant has a separate and distinct claim of title to a parcel of the land which is below $2,000.00 in value, he could not sue for it in the circuit court, and it would appear that he could not be sued for it in that court. . . ."
>
> ". . . There can be no doubt that when the result of a suit, if successful, would be a separate decree against each defendant, the value of the dispute

between such defendant and the plaintiff must exceed $2,000.00."

In the instant case there can be no doubt, as in *Stemmler v. McNiel, supra,* that if plaintiff prevails in the action there would in effect be entered a separate decree as to each tract of tidelands owned by the various defendants. Defendants, in this action, each own separate small tracts of the uplands and the abutting tidelands along the Hood Canal in the State of Washington (Tr. 19-32). The separate tracts of tidelands vary in width from less than 80 feet to 4,138.2 feet (Tr. 19-32; also portion of Pretrial Order Tr. 80 not printed in transcript). The Potlatch Beach tracts are each less than fifty feet (Pl. Ex. 15, Tr. 106). Defendants do not own the tidelands as tenants in common or jointly (Tr. 19-32).

Likewise the defendants' defenses are by and large separate and unrelated. Several of the defendants owning tidelands in the extreme north end of what is now the Skokomish Indian Reservation, on facts not related to most of the other defendants, assert as a defense that the tidelands in that area could never have been a part of the Indian Reservation by reason of the A. D. Fisher Donation claim (Tr. 87-89). At the same time the defendants owning tidelands several miles away in the southerly portion of the area in dispute defend on the basis that there is a dispute as to the boundary of the Skokomish Indian Reservation (Tr. 96). Likewise, a few of the defendants set up a prior action pending as a defense (Tr. 95-96). Each defendant, on facts peculiar to each defendant, has raised de-

fenses based on adverse possession and estoppel and upon the grounds that the conveyance of the uplands to the various defendants, at different times, from their several predecessors in title who were Indian allotees of the uplands carried with it title to the tidelands in question (Tr. 90-93). The only defenses common to the defendants and depending on like facts are that the court lacks jurisdiction, that plaintiff lacks the capacity to bring the action and the general denial of plaintiff's complaint (Tr. 86-96).

Based on the foregoing, we submit that plaintiff's action should be dismissed since the value of plaintiff's rights as against each defendant does not exceed $3,000.00.

Title Necessarily in Appellees or United States and Not in Appellant

Appellant does not plead and cannot claim or show a basis for title in itself to the tidelands in question. At best, that title must be either in appellees or the United States.

There is no question but that the tidelands and all lands under navigable waters were held by the United States in trust for the state to be formed:

Pollard v. Hagen (1845) 3 How. 212, 11 L.ed. 565;

Shively v. Bowlby (1893) 152 U.S. 1, 38 L.ed. 331 (particularly pp. 40, 48, 49, and 57 to 58);

Eisenbach v. Hatfield (1891) 2 Wash. 236, 26 Pac. 539.

The Enabling Act pursuant to which Washington

Territory was organized into a state (10 St. at L. 172) and the Washington State Constitution (Art. XVII) recognize the same principle.

There can be no question but that title to the tidelands described in this action is in the appellees as successors in interest to the State of Washington and beyond the power of Congress to vest in the appellant corporation (if indeed any Act of Congress can be found to any such effect), unless the Indian Reservation referred to by appellant clearly included the tidelands. The tidelands either vested in the state and hence in appellees or the tidelands were so fixed in the Indian reservation that it was not possible by the Enabling Act to vest the same in the state to be so formed. The tidelands are not in any treaty, order or record, pleaded by appellant stated to be in the reservation.

United States v. Ashton (1909) 170 Fed. 509.

Appellant can only rely on some contention that the tidelands are appurtenant to the upland portion of the reservation. But if that is appellant's reliance, then what of the fact that apparently portions of the reservation were platted into Indian lots or tracts and suitably allotted and disposed of such that the same have since been privately platted in accordance with recorded plats pleaded by appellant and known as Potlatch Beach Tracts and otherwise? (See portions of Pretrial Order, Tr. 80, not however printed in transcript.) Do not such allotted and sold portions of the reservation carry the same appurtenant title to the abutting tidelands, which appellant must be contending would have made such tidelands initially a part of the reservation?

Actually the reservation extends to high water mark. If it be appellant's contention that the reservation of the described uplands necessarily incorporated the abutting tidelands, then it must also be true that the subsequent disposition of the uplands to appellees carried to appellees the abutting tidelands.

Equity Case — Appellant Must Prevail, If At All, on Strength of Own Title

The appellant corporation in a quiet title suit and in an equity form must stand or fall on the strength of its own title and rights. Title, so far as can be known from any Acts of Congress or applicable law, would, even under appellant's contentions, be in the United States if not in the appellees, and would not, in any event, be in appellant. It is a well-known equity principle, applicable to all quiet title actions, that the appellant must succeed, if at all, upon the strength of its own title and not on account of any weakness in the title of the adversary.

Mitchell v. Cunningham (CA-9 1925) 8 F.2d 813.

Public Law 85-758, approved August 25, 1958, conveying to the Makah Indian Tribe specific lands in their reservation, illustrates the recognized necessity for such affirmative congressional action.

Nonjoinder of United States — Indispensable Party

Appellant sought to make the United States an involuntary party to this action (Tr. 125). The United States, acting through the Department of Justice, refused to become a party to the litigation (Tr. 126). The

District Court sustained the objection of the United States Attorney and hence this appeal is being prosecuted by a party having no title interest and no cause of action. Appellant asks this court to justify the continued prosecution of the action on the sole ground that it would be less burdensome on appellees to defend two such lawsuits than to deprive appellant of the right to prosecute the action.

The District Court did determine that title was clearly in the United States, rather than in appellant, if any of appellant's contentions were valid, and hence that the United States would be a necessary and indispensable party to the assertion of those claims against appellees. The only justification appellant urges for proceeding with the action without joinder of the United States is the relative convenience theory expressed by the Tenth Circuit in *Choctaw v. Seitz* (CA-10 1951) 193 F.2d 456.

In the last cited case the court at page 461 says:

> "So it comes down to this: If we hold that the United States is an indispensable party, the Nations will be unable to assert their longstanding claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining a judgment in their favor in the instant action.
>
> "We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the ac-

> tion without the joinder of the United States, weigh heavily in favor of the Nations."

Thus is posed the question whether it is more important and equitable to adhere to the rule that a necessary and indispensable party should be made a party before subjecting parties to the burdens of litigation, particularly such as is inconclusive, or to permit a litigant to wage an action presently even though it cannot bind the real party in interest.

The Tenth Circuit repeatedly cites its decision. We do not believe it has been accepted elsewhere.

We have been unable to find any other decision which goes this far and we think it quite obvious that if the United States is not a party to this action, it would "leave the controversy in such a situation that its final determination would be inconsistent with equity and good conscience."

The present litigation has been pending for some ten years. The appellant tribe was incorporated approximately ten years before that. During all of this period, of course, the appellants' threatened action has imposed a serious cloud upon the title of the appellee's lands. To protract the matter further and then to have a decree entered, which still would not settle any of the issues, must it seems be inconsistent with equity and good conscience.

This court has held, in effect, contrary to the *Seitz* decision on the question of the indispensability of the United States in an action involving the title to Indian lands. This it did in *Gerard v. U.S.,* 167 F.(2d) 951, an appeal from a decision of Judge Pray (D.C. Mont.)

cited as *Gerard v. Mercer,* 62 F.Supp. 28. The action was brought by two Blackfeet Indians seeking to quiet title to land on the Blackfeet Indian Reservation. The action was dismissed in the lower court on the ground that the United States was a necessary party and that the Indian plaintiffs had no power to joint it. In considering this issue Judge Pray said at page 30:

> "That the United States is an indispensable party to this action is a proposition seriously advanced by defendants, supported by authorities that seem to afford some justification for the claim;"
>
> * * *
>
> "Without the presence of the United States in this action vital issues would remain undecided even though a judgment were entered herein for complainants and the whole subject would remain open for relitigation. The authorities cited would appear to be applicable to this contention and afford ample support of defendants' objection."

On appeal this court reversed Judge Pray, but on the ground that the United States had consented to be sued and should be made a party to the action. It is inherent in that decision that the United States was an indispensable party.

We believe the rule of the *Gerard* cases is sound and that it should be followed in the instant case instead of the *Seitz* rule.

Dismissal of the United States

Appellant's brief, at page 2, refers to the United States having been originally named as a defendant. Pursuant to stipulation (Tr. 33) of February 17, 1949, between the plaintiff and the United States to the effect

that the United States had no interest in the action, an order (Tr. 36) was entered March 17, 1949 to the effect that the United States had no interest in any property described in the complaint, was not a necessary or proper party and was ordered dismissed.

That dismissal was without the concurrence, knowledge or participation of any of the defendant appellees.

Prior Pending Action Warranted Dismissal of This Action

A prior action to quiet the title to part of the lands which are the subject matter of this action had been previously instituted by the appellee, Charles T. Wright, in Mason County Superior Court Cause No. 5189, filed July 30, 1948. This senior state action named appellant, Skokomish Indian Tribe, as a party defendant and the following appellees herein were also named as parties defendant: Paul Hunter, Mary Hunter, City of Tacoma, State of Washington, Marcus Nalley and Frances Nalley (Tr. 95, Ex. 6, Tr. 110).

The issues and objectives in the prior state action and this action are similar in that the title, rights and location of the boundary lines of each of the last named parties' tidelands is sought to be determined and quieted in each action. By reason of its prior jurisdiction over the same subject matter and of the common defendants named above and over appellant herein, the Mason County Superior Court has retained and should retain jurisdiction of this controversy or suit so far as those parties are concerned.

Harkin v. Brundage (1928) 276 U.S. 36;

Pufahl v. Estate of Parks (1936) 299 U.S. 217.

It may be noted that procedural steps prescribed by federal law and pertinent Washington state statutes for removal of the senior state action to the United States District Court were not accomplished or even attempted. 28 U.S.C. Sec. 1446. The rule is well established that the federal district courts and the state courts have concurrent jurisdiction of all suits arising out of the United States Constitution and United States laws, save those actions as expressly restricted and reserved by Congress; that where concurrent jurisdiction does exist, a state court by taking prior jurisdiction as here excludes jurisdiction of the federal court on the same matters by the same parties.

Grubb v. Public Utilities (1930) 281 U.S. 470;

United States v. Bank of New York (1936) 296 U.S. 463.

Aboriginal Rights

Appellant assumes throughout its brief that perhaps some right or privilege should be accorded it as an "aboriginal right," "original title," "separate sovereignty," or "reserved aboriginal right." These notions, we believe, are outside the record. The treaty relied upon (12 St. at L. 933) in Article I leaves no room for any such contentions, nor are these notions otherwise sustainable as law. See the following cases cited by appellant:

State v. Quigley (1958) 152 Wash. Dec. 192, 324 P.2d 827;

Hynes v. Grimes Packing Co. (1949) 337 U.S. 86, 93 L.ed. 1231.

Dilatoriness

The protracted course of this case, as related at the opening of this brief under the caption "Introduction —Nature of Case," confirms the absence of any equity in appellant's position and indeed suggests appellant's limited interest in the matter. Plaintiff's Exhibit 9 (Tr. 106) shows that this type of action is prosecuted under a contingent fee agreement and that appellant is not the sole party in interest.

It is not the position of appellees that the indifference of appellant and its lack of diligence in prosecuting the action must govern the disposition this court makes of this appeal, but that the circumstances warrant this court in being less concerned than otherwise it might with the gravity of barring an action on jurisdictional grounds.

Conclusion

Appellees accordingly contend the District Court correctly dismissed the action and that such disposition was justified:

1. Because jurisdiction was not shown in the district over any federal question.
2. Because the required jurisdictional amount was not shown.
3. Because of an unjustified misjoinder of numerous independent claims against numerous parties not having a common interest.
4. Because of the absence of an indispensable party.
5. Because of lack of right or title in plaintiff to the cause of action, if any.

6. Because of want of equity or right in plaintiff to pursue the protracted litigation.

7. Because a corporation chartered under congressional act is entitled to no immunities or indulgence not available to all other citizens, even though chartered to represent Indians.

8. Because a prior state court action remains pending concerning the same subject matter and many of the same parties.

Respectfully submitted,

SKEEL, MCKELVY, HENKE, EVENSON & UHLMANN
WILLIAM E. EVENSON, JR.
Dexter Horton Building, Seattle 4, Wash.

CARNAHAN, GORDON & GOODWIN
HARRY SAGER
Puget Sound Bank Building, Tacoma 2, Wash.

GLENN E. CORREA
Bell Building, Shelton, Washington

RYAN, ASKREN, MATHEWSON, CARLSON & BUSH
RAYMOND C. SWANSON
Henry Building, Seattle 1, Washington

MARSHALL MCCORMICK
City Attorney, City of Tacoma

ROBERT R. HAMILTON
ALLAN R. BILLETT
Assistants City Attorney
304 City Hall, Tacoma, Washington

B. FRANKLIN HEUSTON, Shelton, Washington

J. W. GRAHAM, Shelton, Washington
Attorneys for Appellees.

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